Office-Supreme Court, U.S.
FILED
MAR 8 1985
ALEXANDER L. STEVAS,
CLERK

Nos. 84-550 and 84-867

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

INTERSTATE COMMERCE COMMISSION,
Petitioner,
v.
BRAE CORPORATION, *et al.*,
Respondents.

CONSOLIDATED RAIL CORPORATION,
Petitioner,
v.
AHNAPEE AND WESTERN RAILWAY COMPANY, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENT CANADIAN RAILROADS IN OPPOSITION

RICHARD J. FLYNN, P.C.*
RICHARD E. YOUNG
TERENCE M. HYNES
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000
Attorneys for Canadian National Railway Company and Canadian Pacific Limited

* Counsel of Record

March 8, 1985

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

The questions presented in the petitions for certiorari, and in the brief for the United States, concerning the car hire rules are based on a totally flawed interpretation of the agency action at issue and the decision of the court below. The Interstate Commerce Commission ("Commission") did not decrease regulation of boxcar car hire services, but rather imposed a totally new regulatory scheme.* The Court of Appeals did not "substitute its economic analysis for that of the agency"; the court correctly found that the Commission had exceeded its statutory authority because the governing statute involved is limited to the power to deregulate. The attacks of the Commission, Conrail, and the Solicitor General on the decision of the Court of Appeals are wholly without merit.

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* The Petitions for Certiorari filed by the Commission and by the Consolidated Rail Corporation ("Conrail") seek review of those portions of the decision of the Court of Appeals concerning the lawfulness of the exemption as it applies to joint rates and car hire (Commission Petition at 6-18; Conrail Petition at 13-24). In the instant brief the Canadian railroads (Canadian National Railway Company and Canadian Pacific Limited) will address only the requests for review of the car hire issue. Other parties will separately file reply briefs addressing the requests for review of the decision of the Court of Appeals regarding the exemption of joint rates.

The Canadian railroads, however, feel compelled to comment upon the Solicitor General's characterization of the decision of the Commission as involving, *inter alia*, an "exemption of boxcar traffic from maximum rate regulation." *See* Brief for United States, at 5-6, 9. This characterization evidences an ignorance of the Commission's statutory powers and the scope of the Commission decision at issue here. Under the Interstate Commerce Act, the Commission has jurisdiction to find rates unreasonably high or unreasonably low. *See* 49 U.S.C. § 10701a(b)-(c). The Commission exempted boxcar traffic not merely from "maximum rate regulation," but from *all* rate regulation—including regulation of rates that the Commission might otherwise find to be unreasonably low. *See* App. 121a-122a, 126a, 152a.

The question presented for review is:

Whether, by prescribing regulations that confer on rail carriers, for the first time, the right to assess specified car hire charges against other rail carriers without their consent and without regard to market forces, the Commission exceeded its authority under Section 10505 of the Interstate Commerce Act (49 U.S.C. § 10505), which empowers the Commission to "exempt" rail carrier transportation from regulation under certain specified circumstances.

LISTING REQUIRED BY RULE 28.1

The parent companies, divisions, affiliates and subsidiaries of the Canadian Railroads are set forth below:

CANADIAN NATIONAL RAILWAY COMPANY

CN Rail
CN Enterprises
CN Investment Division
Autoport Limited
Canac Consultants Limited
The Canada and Gulf Terminal Railway Company
Canadian National Express Company
Canadian National Hotels (Moncton) Ltd.
Canadian National Railway Company
The Canadian National Railway Securities Trust
Canadian National Steamship Company, Limited
Canadian National Telegraph Company
Canadian National Transfer Company Limited
Canadian National Transportation, Limited
The Canadian Northern Quebec Railway Company
Canat Limited
Canaven Limited
Chalut Transport (1974) Inc.
Chapman Transport Limited
CN Exploration Inc.
CN (France) S.A.
CN Marine Inc.
CNM Inc.
CN Tower Limited
CN Tower Restaurants Ltd.
CN Transactions Inc.
Coastal Transport Limited
Cronin Transport Limited
Detroit, Toledo and Ironton Railroad Company
Domestic Two Leasing Corporation
Domestic Three Leasing Corporation
Domestic Four Leasing Corporation

Duluth, Winnipeg and Pacific Railway Company
Empire Freightways Limited
Grand Trunk Corporation
Grand Trunk Land Development Corporation
Grand Trunk Radio Communications, Inc.
Grand Trunk Western Railroad Company
The Great North Western Telegraph Company of Canada
Husband International Transport (Ontario) Limited
Husband Transport Limited
Midland Superior Express Limited
The Minnesota and Manitoba Railroad Company
The Minnesota and Ontario Bridge Company
Mount Royal Tunnel and Terminal Company, Limited
The Northern Consolidated Holding Company Limited
Northwestel Inc.
116334 Canada Inc.
116335 Canada Inc.
The Quebec and Lake St. John Railway Company
Royal Transportation Limited
Swna River-The Pas Transfer Ltd.
Terra Nova Telecommunications Inc.
The Toronto-Peterborough Transport Company, Limited
Transport Husband (Quebec) Inc.
Transport Route Canada Inc.
The Belt Railway Company of Chicago
Canaprev Inc.
Central Vermont Railway, Inc.
Chicago and Western Indiana Railroad Company
Compagnie de gestion de Matane Inc.
Computer Sciences Canada, Ltd.
East Yard Development Ltd.
E I D electronic Identification Systems Ltd.
Eurocanadian Shipholdings Limited
Hailifax Industries (Holdings) Limited

Halterm Limited
Intercast S.A.
Lakespan Marine Inc.
Les Enterprises Bussieres Ltee
The Public Markets, Limited
Seabase Limited
Shawinigan Terminal Railway Company
Societe du port ferroviaire de Baie Comeau-Hauterive

CANADIAN PACIFIC LIMITED

Canadian Pacific Enterprises Limited
The Algoma Steel Corporation, Limited
AMCA International Limited
Cominco Ltd.
Great Lakes Forest Products Limited
PanCanadian Petroleum Limited
Steep Rock Resources Inc.
Maple Shipping Company (U.K.) Limited—
(A subsidiary of wholly-owned Canadian Pacific Steamships, Limited)
Canscade Pipe Line Limited
The Dominion Atlantic Railway Company
The Kingston and Pembroke Railway Company
The Lake Champlain and St. Lawrence Junction Railway Company
The Lake Erie and Northern Railway Company
Manitoba and North Western Railway Company of Canada
Massawippi Valley Railway Company
The Montreal and Atlantic Railway Company
Ontario and Quebec Railway Company
The St. Lawrence and Ottawa Railway Company
Soo Line Railroad Company
Toronto, Grey and Bruce Railway Company
Telesat Canada
The Toronto Terminals Railway Company
Trailer Train Company

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BRIEF FOR THE RESPONDENT CANADIAN RAILROADS IN OPPOSITION

STATUTES INVOLVED

The pertinent portions of 49 U.S.C. § 10505 are set forth at Appendix G of the Commission's Petition (App. 217a).[1] Pertinent portions of 49 U.S.C. § 11122 are set forth at pages 4 and 5 of Conrail's Petition.

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[1] In the instant brief, the abbreviation "App." will be used to refer to the Appendix filed by the Commission in conjunction with its petition for certiorari.

STATEMENT OF THE CASE

The Decisions of the Commission

On May 22, 1981, the Consolidated Rail Corporation ("Conrail") petitioned the Interstate Commerce Commission ("Commission") for an exemption under section 10505 of the Interstate Commerce Act (49 U.S.C. § 10505) from regulation for all transportation that Conrail provides in boxcars. As originally proposed, the exemption would have encompassed all regulated aspects of Conrail's boxcar movements (App. 105a). These aspects included not only freight rates that carriers charge shippers for boxcar transportation, but also the rental (car hire) rates paid by railroads for the use of one another's boxcars.

At the time Conrail filed its proposal, car hire rates were based on a formula prescribed by the Commission. This formula distributed car ownership costs evenly over the days that a car is in use, regardless of whether the car is on the tracks of the railroad that owns it, or on another railroad's tracks (App. 127a). The owner of the car (the originating carrier) collected the prescribed rental charge (sometimes known as the per diem rate) for each day that the car was on another carrier's lines, even after the car had been unloaded, and regardless of whether the car stood idle on the other carrier's lines, was reloaded for return movement, or returned empty (App. 163a).[2] On the other hand, the railroad over which the boxcar travels (the destination carrier) had no authority to assess charges against the originating carrier for the storage or return of the boxcar.

In response to Conrail's petition, the Commission initiated a rulemaking proceeding. The Commission invited public comments not only on the petition of Conrail, but also on the broader issue of whether the Commission

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[2] The "per diem rate" is composed of a daily rental charge and a per-mile rental charge. *See* App. 163a, 178a; *Car Service Compensation—Basic Per Diem Charges*, 358 I.C.C. 716, 721 (1977).

should grant a partial or complete exemption of all boxcar traffic nationwide (47 *Fed. Reg.* 4100).

More than 200 comments were filed in response to Conrail's petition, most of them opposing the proposed exemption. Parties filing comments included the Canadian Railroads, Canadian National Railway Company ("CN") and Canadian Pacific Limited ("CP").[3] CN and CP were concerned with the outcome of the Commission proceeding because of the critical role that boxcar transportation plays in the flow of commerce between Canada and the United States. International movements account for one-third of the traffic handled by CN and CP (App. 83a-84a). Boxcar traffic accounts for nearly half of CN's international rail traffic, and for approximately one-third of the carloads handled by CP in international service.

In response to the various comments filed by the parties, Conrail offered a modified proposal. With respect to car hire, Conrail proposed that the Commission authorize all railroads to take the following actions with respect to boxcar equipment use: (1) assess charges not exceeding 35 cents per mile for the empty movement or return of cars where performed at the direction of the car owner; (2) impose storage fees (not exceeding the per diem rate) on the car owner for boxcars that have been empty for more than seventy-two hours;[4] and (3) in lieu of these charges and per diem rates, negotiate bilateral agree-

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[3] CN is owned by the Government of Canada, while CP is a privately held Canadian corporation (App. 83a).

[4] Although Conrail characterizes the Commission's decision as merely "allow[ing] destination railroads to cease paying car hire for empty boxcars stopped on their lines with the owner's consent" (Conrail Petition at 10 n.14), the Commission made clear in its decisions that it was authorizing carriers to impose storage fees to "offset" or "reclaim" per diem charges. *See, e.g.*, App. 128a, 135a, 136a, 207a. The Solicitor General agrees that the Commission authorized carriers to "charge offsetting storage fees no greater than the per diem charges" (Brief for United States, at 29). *See also* Commission Petition at 14-15.

ments governing car hire rates, empty movements, and storage (App. 128a, 152a, 207a). Under the revised proposal, Commission regulation of car hire and car service would not otherwise be affected. Thus, the Commission would continue to prescribe the per diem rates assessed by originating carriers, absent an agreement between that carrier and the destination carrier (App. 128a). Conrail also proposed that the Commission retain jurisdiction over mandatory interchange of equipment, reciprocal switching, car supply, and freight car pooling agreements (App. 106a, 152a).

On April 29, 1983, the Commission adopted Conrail's modified car hire proposal on a national basis (App. 105a). With respect to car hire, the Commission found that the Conrail proposal would encourage more efficient utilization of boxcars and reduce the incentive under the current boxcar interchange system for carriers to load their own cars while returning other carriers' cars empty (App. 127a-135a). Thus, the Commission authorized carriers to impose storage fees and empty return charges (and to make bilateral car compensation agreements), and retained jurisdiction over other aspects of car hire and car service, including the prescription of per diem rates (App. 134a-135a).

In adopting Conrail's car hire proposal, the Commission stated that it was not relying solely on Section 10505, because of its doubts concerning the extent of its jurisdiction under that statute (App. 136a):

> "Our order adopting Conrail's modified proposal is a partial exemption from regulation subject to conditions. *We recognize, however, that it could be construed in some respects as being new regulation. To allay any doubt about the sufficiency of section 10505(a) as authority for our approval of Conrail's modified proposal, we shall take this action also under section 11122.* Under that section, we are to encourage not only the purchase and acquisition of

freight cars, but also their efficient use. In addition to car compensation, our regulations may include the other terms of any arrangement for use of freight cars. Storage reclaim and return charges clearly constitute such 'other terms' and will serve to encourage efficient boxcar use. Section 11122 authorizes, but does not require, the Commission to prescribe car hire charges. Consequently, it permits us to make the prescribed car hire optional and allow the substitution of bilateral car hire agreements (as we have already done to some extent in Ex Parte No. 334 (Sub-No. 4)). In our supplemental notice published June 25, 1982 (47 F.R. 27573), we fully informed the public that we were considering a proposal to authorize the imposition of storage reclaim and return charges on boxcars and to allow optional bilateral car hire agreements; we have received ample public comment on the proposal. Consequently, *whether Conrail's proposal with respect to boxcar equipment charges is viewed as an exemption or an affirmative regulation, we may properly adopt it in this proceeding.*" (Emphasis added.)

Following issuance of its decision (known as *Boxcars I*), the Commission received numerous petitions for reconsideration. In October 1983, the Commission issued a decision (*Boxcars II*) denying the petitions (App. 155a). In its decision, the Commission reiterated that absent a contrary agreement between the parties, "the prescribed car hire rates continue to apply to empty movements, whether or not empty return charges are imposed by the carriers handling the car," and "cars stored off line are subject to a reclaim or cancellation of the applicable car hire for the storage period, not to the imposition of other storage charges" (App. 165a). In addition, the Commission *withdrew* any reliance on Section 11122 as authority for its actions, because the failure of its notice of proposed rulemaking to cite that statute "may raise substantial legal questions" (App. 167a).

The Decision of the Court of Appeals

On review by the Court of Appeals for the District of Columbia Circuit, the Commission's decision was affirmed in part, vacated in part, and remanded (App. 15a, 91a-93a). The court vacated the decision of the Commission to exempt boxcar rates from regulation insofar as it applied to joint rates and to the Alaska Railroad, but held that the Commission had acted lawfully in deregulating other freight rates (App. 20a-50a, 69a-83a).

The Court of Appeals also held that the Commission had exceeded its statutory authority under Section 10505 insofar as the car hire component of its decision was concerned: "[T]he ICC car hire decision was the promulgation of a substantive rule, and not an exemption authorized by 49 U.S.C. § 10505(a) and therefore must be vacated" (App. 93a). In its analysis, the court first reviewed the language, legislative history, and purpose of Section 10505, and concluded that Congress limited the Commission's powers under that statute "to the power to deregulate; to remove regulatory burdens and to allow the marketplace to influence decisions in the rail industry" (App. 59a).

The court then turned to the issue of whether the car hire decision constituted an "exemption" within the meaning of Section 10505. It concluded that "the Commission here was *not* deregulating, but rather was imposing a new regulatory framework over the car hire relationship" (App. 60a) (emphasis in original). The Commission had "placed two significant bargaining weapons in the arsenal of the destination carrier"—storage fees and empty return charges—and the destination carrier was entitled to assess these charges regardless of market forces (*id.*). At the same time, however, the Commission had retained jurisdiction to prescribe per diem rates (Pet. 60a-61a). By contrast, if the Commission had truly intended to deregulate car hire, it would have sim-

pay provided that the parties determine all of these matters through negotiations, and that no party would enter negotiations with such entitlements. The Commission's actions therefore did not represent deregulation, but merely altered the bargaining relationship between the parties (Pet. 60a-61a).

Because it found that the Commission's decision concerning car hire did not constitute deregulation, the Court of Appeals concluded that the Commission lacked authority to take such action under Section 10505(a) (App. 68a). The court emphasized, however, that its decision applied only to the Commission's attempt to invoke Section 10505 as the source of its authority for regulations entitling carriers to assess storage fees and empty return charges. According to the court, Section 11122, which empowers the Commission to regulate the terms of car hire, may provide an adequate basis for precisely the car hire "package" that the Commission sought to implement, provided that the requirements of that statute are otherwise met (App. 65a-68a). Alternatively, if the Commission truly desires to leave the terms of car hire to market forces, it is authorized under Section 10505 to deregulate car hire completely by providing that such terms are to be determined by the carriers through bilateral agreements, without regulation, if the Commission can make the predicate findings under that section (App. 69a).

SUMMARY OF ARGUMENT

The Solicitor General's highly qualified support of the requests for review of the car hire issue amply demonstrates why the issue should *not* be reviewed by this Court. The Solicitor General considers the car hire issue to be of such limited importance that he recommends denial of the requests if this Court does not also review the joint rate issue (Brief for United States, at 26 n.14). As the Solicitor General recognizes, and as will be discussed be-

low, "The decision below appears to leave room for adoption of this regulation on remand under other [statutory] authority," and pending Commission proceedings concerning car hire "offer the Commission alternative means for accomplishing its objectives" (*id.*). Given the availability of statutory and procedural alternatives to the Commission, the decision of the Court of Appeals with respect to car hire does not present issues of sufficient importance to warrant consideration by this Court.

Despite the concessions of the Solicitor General, the Commission asserts that its petition for a writ of certiorari should be granted because "[t]his is a case of first impression concerning the appropriate role of court and agency in carrying out these broad new delegations of exemption power" (Commission Petition at 4). According to the Commission, the Court of Appeals substituted its economic judgment for that of the Commission, misread the Commission's decision, and impermissibly circumscribed the Commission from addressing car supply decisions (*id.* at 14-18). The Commission is incorrect.

As its opinion makes clear, the Court of Appeals did not "substitute its economic judgment for that of the Commission," but simply interpreted the scope of Section 10505 of the Interstate Commerce Act. Following established rules of statutory construction, the court held that the "exemptions" that the Commission is authorized to grant under this statute must constitute deregulation—that is, a lessening of regulatory burdens. This interpretation of the statute is plainly correct, and neither the Commission nor Conrail appears to question it.

The protests of the Commission and Conrail notwithstanding, the Court of Appeals was also clearly correct in holding that the car hire aspect of the Commission's decision was not an "exemption" and was therefore beyond the scope of the Commission's authority under Section 10505. As the court recognized, the Commission imposed a new regulatory framework on car hire by conferring

on destination carriers, for the first time, the right to assess storage fees and empty return charges. Under this framework no carrier may assess charges with respect to car hire except those authorized by the Commission, and the maximum levels of those charges are prescribed by the Commission. This clearly is not "deregulation."

Both Conrail and the Commission (which expressed uncertainty over the issue in its *Boxcars I* decision) appear to argue that the car hire aspect of the Commission's decision constitutes an "exemption" because carriers can "circumvent" the authorized car hire charges by raising their freight rates, which have been deregulated. This position is a *post hoc* rationalization that is devoid of logic. It ignores not only the nature of the Commission's decision, but also the Commission's finding that carriers are constrained in their ability to raise freight rates by competitive forces.

Although Conrail and the Commission attempt to demonstrate a conflict between various decisions of this Court and the decision of the Court of Appeals, no such conflict exists. In none of the decisions cited by the Commission did this Court hold that reviewing courts must accord the Commission unquestioned and unlimited deference when the Commission is attempting to remedy car supply problems. In each decision this Court adhered to the principle that an agency must act within the scope of its statutory authority. Here, in a careful and searching analysis, the Court of Appeals determined that the Commission had exceeded the scope of its statutory authority. Its conclusion was plainly correct, and should not be reexamined.

Finally, contrary to the Commission's contention, the Court of Appeals did not "foreclose" the Commission from acting to alleviate car supply problems. The Court of Appeals merely held that the Commission lacked authority under Section 10505 to take the actions at issue here with respect to car hire. As the Solicitor General concedes, the

court noted that the Commission may be able to impose such regulation under Section 11122 of the Interstate Commerce Act, or (if the Commission wishes to leave car hire matters entirely to market forces) may deregulate these matters entirely under Section 10505, provided that the Commission can make the findings required by these statutes. Although Conrail suggests that the decision of the Court of Appeals will "severely limit" the exemption authority of the Commission, the decision rejects only the attempt of the Commission to invoke Section 10505 as a source of authority to entitle carriers to assess storage fees and empty return charges.

Because the decision of the Court of Appeals is so clearly correct, and leaves the Commission free to take action under other statutes (or to grant true exemptions), the petitions for certiorari should be denied.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS WAS CLEARLY CORRECT

This case involves the construction of a particular statute—Section 10505 of the Interstate Commerce Act. Notwithstanding the Commission's arguments to the contrary, it raises no new issues concerning the roles of reviewing courts and agencies.[5] The principles governing

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[5] The instant case does not mark the first occasion on which the scope of Section 10505 has been interpreted. In two previous cases, the Courts of Appeals for the District of Columbia Circuit and the Fifth Circuit affirmed exemptions by the Commission for the most part, but held that the Commission had exceeded its authority under Section 10505 in certain respects. *See McGinness* v. *ICC*, 662 F.2d 853 (D.C. Cir. 1981) (affirming ICC decision to exempt "designated operators" from merger and interlocking directorate provisions of Interstate Commerce Act, but holding that ICC exceeded its authority in exempting operators from labor protection requirements of Act); *American Trucking Associations* v. *ICC*, 656 F.2d 1115 (5th Cir. 1981) (affirming ICC decision to deregulate transportation provided by rail carriers in connection

the relationship between courts and agencies have been firmly established by this Court. The Court of Appeals followed those principles in this case, and its interpretation of the statute was clearly correct.

The Commission and Conrail basically argue that the Court of Appeals should have deferred to the Commission's interpretation of Section 10505 as empowering the Commission to entitle rail carriers to assess new charges against each other, regardless of market forces and without the consent of the other carrier. This argument is incorrect. An agency may not exceed its statutory authority. *Batterton* v. *Francis*, 432 U.S. 416, 425-426 (1977); *FPC* v. *Texaco, Inc.*, 417 U.S. 380, 393 (1974). This Court has stated that an agency's construction of the statute that it is charged to administer is not binding on a reviewing court:

> "[T]he courts are the final authorities on issues of statutory construction, . . . and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the Congressional policy underlying a statute.'"

Volkswagenwerk v. *FMC*, 390 U.S. 261, 272 (1968), *quoting FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965). *See also FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981).

Although a reviewing court is required to give some deference to an agency's interpretation of the statute under which it purports to operate, that deference is constrained by the obligation of the reviewing court "to

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with trailer-on-flatcar and container-on-flatcar service, but holding that ICC acted arbitrarily in including Alaska Railroad within exemption). The Commission did not seek review of these decisions by this Court. In *Simmons* v. *ICC*, 697 F.2d 326 (D.C. Cir. 1982), the Court of Appeals for the District of Columbia Circuit affirmed a decision of the Commission to grant a partial exemption to state governments proposing to operate abandoned rail lines, pursuant to Section 10505.

honor the clear meaning of a statute, as revealed by its language, purpose, and history." *Southeastern Community College* v. *Davis*, 442 U.S. 397, 411 (1979); *Teamsters* v. *Daniel*, 439 U.S. 551, 566 n.20 (1979). Thus, a reviewing court is not required to defer to an administrative construction of a statute that is inconsistent with its language and purpose. *See Morton* v. *Ruiz*, 415 U.S. 199, 237 (1974); *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, 94-95 (1973); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969).

The Court of Appeals followed those principles in this case. As required, the court first examined the language of Section 10505(a). *See, e.g., Southeastern Community College* v. *Davis*, 442 U.S. at 405; *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197 (1976). That statute provides, in pertinent part (49 U.S.C. § 10505(a)):

> "In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or transaction or service when the Commission finds that the application of a provision of this title—
>
> (1) is not necessary to carry out the transportation policy of this title and
>
> (2) . . . the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power."

The Court of Appeals first determined that "the plain meaning of the word 'exempt' connotes a lessening of regulation, a decrease in regulatory burdens" (App. 57a-58a). This analysis was consistent with rulings of this Court that the words of a statute should be given their ordinary meaning.[6]

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[6] *See, e.g., Ford Motor Credit Co.* v. *Cenance*, 452 U.S. 155, 158 n.3 (1981); *Burns* v. *Alcala*, 420 U.S. 575, 580-581 (1975); *Malat* v. *Riddell*, 383 U.S. 569, 571 (1966).

After determining the ordinary meaning of the term "exempt," the Court of Appeals then conducted an extensive examination of the legislative history of the statute (App. 58a-59a). This approach was again proper, for this Court has held that in construing a statute a court must interpret the words of the statute in light of the purposes that Congress sought to achieve. *See Chapman* v. *Houston Welfare Rights Organization*, 441 U.S 600, 608 (1979).

The numerous portions of the legislative history cited by the Court of Appeals clearly demonstrate that Congress intended the Commission to use its exemption powers only to deregulate and to remove regulatory burdens (App. 58a-59a). The Court of Appeals properly placed particular reliance on the Conference Report on the Staggers Act regarding the exemption provision. In cases involving statutory construction, the conference report on the statute is entitled to great weight. *National Association of Greeting Card Publishers* v. *U.S. Postal Service*, 103 S. Ct. 2717, 2731 n.28 (1983). The Conference Report fully supports the interpretation of Section 10505 by the Court of Appeals:

> "The bill permits exemptions *wherever regulation is not needed* to prevent abuses of market power, regardless of the presence of effective competition. The policy underlying this provision is that while Congress has been able to identify broad areas of Commerce where *reduced regulation* is clearly warranted, the Commission is more capable through the administrative process of examining specific regulatory provisions and practices not yet addressed by Congress to determine *where they can be deregulated* consistent with the policies of Congress. The conferees expect that, consistent with the policies of this Act, the Commission will pursue partial and complete *exemptions from remaining regulation.* The conferees anticipate that through the exemption process *the Commission will eventually reduce its exercise of authority* to instances where regulation

> is necessary to protect against abuses of market power where other federal remedies are inadequate for this purpose. *Particularly, the conferees expect that as many as possible of the Commission's restrictions on changes in prices and services by rail carriers will be removed* and that the Commission will adopt a policy of reviewing carrier actions after the fact to correct abuses of market power." *H. Rep. No.* 96-1430, 96th Cong., 2d Sess. 105 (1980). (Emphasis added.)[7]

Neither the Commission nor Conrail appears to contest the Court of Appeals' interpretation of the exemption statute as authorizing only deregulation. Instead, they argue that the court was wrong in characterizing the car hire decision as a new regulatory framework, rather than deregulation. The Commission and Conrail appear to be arguing that the decision amounts to deregulation because, even if a destination carrier assesses storage fees or empty return charges, carriers can adjust their freight rates—which have been deregulated—in reaction to these charges. The originating carrier can recover the cost of these charges by increasing its freight rate; if this occurs, the destination carrier will be required to decrease

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[7] Congress expressed the same deregulatory intent when it enacted the first version of the exemption statute in 1976, as part of the Railroad Revitalization and Regulatory Reform Act, Pub. L. No. 94-210, § 207, 90 Stat. 31, 42 (1976). The Senate committee report on the bill stated that "the power to exempt from regulation in whole or in part will enable the Commission to commit its limited resources in areas where they are most needed, by enabling it to deregulate those areas which have no significant bearing on the overall regulatory scheme." *S. Rep. No.* 94-499, 94th Cong., 1st Sess. 53 (1975). The House committee report stated that the bill "aid[s] the railroads' competitiveness" by providing "that the ICC can exempt from regulation those rail matters that do not affect the national transportation policy." *H. Rep. No.* 94-725, 94th Cong., 1st Sess. 56 (1975). The exemption statute was recodified in 1978 as Section 10505. The current version of Section 10505 was enacted as part of the Staggers Rail Act of 1980, Pub. L. No. 96-448, § 213, 94 Stat. 1895, 1912-1913. *See American Trucking Associations* v. *ICC*, 656 F.2d 1115, 1118-1120 (5th Cir. 1981).

its freight rate to preserve the business of the shipper (Commission Petition at 16; Conrail Petition at 21 n.33). In addition, when the car hire market is strong, originating carriers can increase their revenues by increasing their freight rates or by entering into agreements with other carriers (Commission Petition at 16). Thus, they argue, the prescribed per diem "can easily and lawfully be circumvented," to the extent the market allows (*id.*). In addition, according to Conrail, carriers can respond to the assessment of empty storage charges by cancelling joint boxcar rates, as they are free to do under the *Boxcars* decision (Conrail Petition at 21 n.33).

These arguments are without merit. First, Conrail and the Commission are advancing an explanation that was not even suggested in prior decisions of the Commission. In *Boxcars II*, the Commission asserted that its decision was an exemption insofar as car hire was concerned for the following reason (App. 167a):

> "[I]t allows carriers to take actions that are inconsistent with the terms of compensation that we prescribe for freight car use under 49 U.S.C. [§] 11122. . . . That is, car users may impose empty return charges and cease payment of car hire on stored cars. Car users and owners may depart from prescribed car hire in other ways if they make bilateral agreements. . . . The exemption is partial because it allows only specified types of departures from the prescribed terms."

The Commission later repeated this justification when it denied petitions for a stay pending judicial review (App. 197a).

The explanations now offered by the Commission and Conrail totally differ from the rationale set forth in these decisions.[8] For that reason alone, such explanations

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[8] As the extensive quotation set forth in the Commission's Petition for Certiorari indicates, in *Boxcars II* the Commission discussed the ability of railroads to adjust their deregulated freight rates in

should be given no weight. As this Court has held, appellate counsel's *post hoc* rationalizations for the action of an agency are not acceptable; the action must be upheld, if at all, on the basis offered by the agency in its decision. *See Motor Vehicles Manufacturers Association* v. *State Farm Mutual Automobile Insurance Co.*, 103 S. Ct. 2856, 2870 (1983); *American Textile Manufacturers Institute* v. *Donovan*, 452 U.S. 490, 539 (1981).

Second, the reliance of the Commission and Conrail on the use of rate increases is inconsistent with the finding of the Commission that continued regulation of freight rates is not necessary to protect shippers from abuses of market power. In *Boxcars I*, the Commission found that carriers are constrained in their ability to raise freight rates by several factors, particularly by the presence of pervasive truck competition (App. 20a-23a, 113a-121a). The arguments of the Commission and Conrail ignore this finding and assume that carriers have unlimited freedom to raise their freight rates to recoup car service charges.

Third, the Court of Appeals was clearly correct in finding that the action of the Commission did not constitute an exemption. The court was not required to defer to the Commission's construction of its decisions; those decisions must speak for themselves. *See FPC* v. *Texaco, Inc.*, 417 U.S. at 395-397.

As the Court of Appeals stated, the Commission's actions did not constitute an "exemption" because the Com-

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reaction to the assessment of empty return charges (Commission Petition at 16). The Commission, however, did not purport to offer this as a justification for its conclusion that the car hire portion of its decision constituted deregulation; the quoted discussion was a response to concerns of certain railroads that the assessment of storage fees and empty return charges "will result in vast transfers of revenue from car owners that originate traffic to delivering carriers" (App. 175a-176a). The Commission explained why it considered its actions an exemption in an earlier, separate portion of the same decision (App. 167a).

mission conferred on carriers new entitlements—the right to charge storage fees and empty return charges—irrespective of market forces and without the consent of the other carrier (App. 60a). This did not reduce regulation, but instead imposed a new regulatory framework on the economic relationship between the destination carrier and the originating carrier (App. 61a):

> "Prior to the *Boxcars* decisions, the originating carrier entered negotiations against a background in which it had, in essence, a statutory entitlement equivalent to the amount of the per diem. The destination carrier had no such entitlement and, in fact, confronted a situation in which, absent agreement, it would have to bear the cost of returning the boxcar. Under the *Boxcars* decisions, the originating carrier enters negotiations against a background in which it has a statutory entitlement equivalent to the amount of per diem. The destination carrier, however, now has a statutory entitlement equivalent to the storage fees and the empty return charges. In striking contrast, had the Commission actually deregulated car hire, then neither party would enter negotiations with a statutory entitlement and the market alone would establish the relative bargaining positions of the parties. It thus becomes obvious that the Commission has shifted entitlements to a point that represents neither deregulation nor the pre-*Boxcars* design. Thereby, the Commission has fixed the initial relative bargaining positions of the parties at a point that does not necessarily reflect either the pre-*Boxcars* scheme or what market factors otherwise might dictate."

Furthermore, the Commission has imposed regulation on the new rights that it has created. As the Commission stated in *Boxcars II*, in assessing storage fees and empty return charges, "carriers may not exceed certain limits . . . That is, return charges are subject to a stated ceiling [35 cents per mile], and stored cars are subject only to car hire reclaims [*i.e.*, may not exceed per diem rates]

and only after 3 days" (App. 167a). Thus, after the Commission's decision, carriers may impose only those charges authorized by the Commission, and the maximum levels of those charges are prescribed by the Commission. This system cannot remotely be considered an "exemption" or "deregulation."

As stated above, the Commission and Conrail nonetheless assert that the Court of Appeals misinterpreted the decisions of the Commission, because under "the total exemption package," carriers can "circumvent" or recoup the various charges (including per diem) by adjusting their freight rates, which have been deregulated. Stated otherwise, they argue that the car hire decision is an exemption because carriers can effectively render the charges meaningless by adjusting their deregulated rates. Conrail advances the additional rationalization that carriers can exercise their newly-granted freedom to cancel joint rates in response to such charges.[9] These arguments are patently illogical. Newly created rights to assess storage fees and empty return charges do not become "deregulation" merely because the carrier against whom these charges are assessed is later able to recoup its costs by increasing freight rates or because it can retaliate by cancelling joint rates.

The Solicitor General, declining to endorse the arguments of the Commission or Conrail, argues that the Court of Appeals engaged in "pure semantics" in finding that the Commission's actions did not constitute an exemption. The decision of the Commission, he argues, had the "effect" of exempting destination carriers from their obligation to pay per diem charges and "from the rule prohibiting any charge for [returning an empty boxcar

[9] The Court of Appeals vacated as arbitrary and capricious the portion of the Commission's decision exempting joint rates from regulation, because the Commission had failed to consider the effects of such an exemption on the division of joint rates between large and small carriers (App. 37a-50a, 92a).

upon request], upon the condition that no charge be imposed in excess of variable cost (35 cents per mile)" (Brief for United States, at 27). He further asserts that exemption of negotiated car hire agreements "would appear to be 'deregulation' in any light" (*id.* at 27-28).

The strained reasoning of the Solicitor General is itself an exercise in "pure semantics." The decision of the Commission speaks for itself. The Commission did not purport to exempt carriers from their obligation to pay per diem charges. Under the decision destination carriers must continue to pay such charges, but now are entitled to assess both separate storage fees not exceeding the per diem charges and empty return charges not exceeding 35 cents per mile. The Solicitor General concedes that these actions "would appear to be 'regulation'" (*id.*). By suggesting that these actions constitute deregulation because they "could be characterized as" an exemption from prior rules, the Solicitor General elevates semantics over substance. Under his reasoning, the imposition of a new regulatory scheme is an "exemption" because it "exempts" carriers from the prior regulatory scheme. In enacting Section 10505, Congress surely did not intend such an illogical result.

Assuming it can make the required statutory findings, the Commission has the authority to prohibit assessment of per diem charges, and under certain provisions of the Interstate Commerce Act it may have the authority to promulgate regulations entitling carriers to impose storage fees and empty return charges. And, in appropriate circumstances, it can deregulate car hire altogether and leave the determination of charges exclusively to negotiated private agreements between carriers.[10] What the

[10] Although the Solicitor General characterizes "exemption of negotiated car hire agreements" as "the third element of the car hire exemption," the Commission is not required to exercise its powers under Section 10505 in order to authorize such agreements. The Commission can accomplish this result simply by abolishing

Commission *cannot* do is to use Section 10505 as a means of conferring new rights on carriers to assess new charges. Such an action cannot reasonably be "characterized" as an exemption.[11]

Finally, the Commission and the Solicitor General argue that the Court of Appeals ignored the ability of carriers under the "exemption" to circumvent car hire charges by making bilateral agreements (Commission Petition at 16; Brief for United States, at 27-28). As the Court of Appeals recognized, however, this argument again overlooks the nature of the Commission's action: "Granting destination carriers additional statutory entitlements vis-a-vis originating carriers under a scheme of continued regulation, however, does not metamorphize into a deregulatory exemption simply because it may encourage some carriers to enter bilateral agreements" (App. 62a).

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its existing regulations concerning car hire rates, which were promulgated pursuant to 49 U.S.C. § 11122. As the Commission stated in *Boxcars I*, "Section 11122 authorizes, but does not require, the Commission to prescribe car hire charges" (App. 136a). Even before it issued the *Boxcars* decisions, the Commission authorized carriers to negotiate bilateral car hire reductions below prescribed per diem rates. *See* Ex Parte No. 334 (Sub-No. 4), *Flexibility in Setting Railroads Per Diem Levels*, 364 I.C.C. 291 (1980).

[11] The Solicitor General is also incorrect in asserting that the car hire decision will "increase the degree to which market forces determine the deployment of resources" (Brief for United States, at 28). It is not "the demand for boxcars," but the new regulatory scheme imposed by the Commission, that will determine compensation levels. Moreover, the Solicitor General's statement that the new charges "will impose the costs of empty car movements on those who demand them" (*id.*), simply begs the question. Obviously those who demand empty car movements will pay the "costs" authorized under the Commission's decision; the issue is whether the "costs" constitute an "exemption" from regulation within the meaning of Section 10505.

II. THE DECISION OF THE COURT OF APPEALS IS NOT INCONSISTENT WITH PRIOR DECISIONS OF THIS COURT

The Commission and Conrail argue that the decision of the Court of Appeals is inconsistent with prior decisions of this Court. The Commission points to three decisions involving Commission attempts to alleviate national car supply problems: *ICC* v. *Oregon Pacific Industries*, 420 U.S. 184 (1975); *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972); and *United States* v. *Florida East Coast Ry. Co.*, 410 U.S. 224 (1973). *See* Commission Petition at 17. The Commission's reliance on these cases, however, is misplaced.

None of the cases cited by the Commission involved Section 10505 or an attempt by the Commission to exempt traffic from regulation. In each case, the Commission was imposing *additional regulation* pursuant to the Esch Car Service Act of 1917.[12] In *Oregon Pacific* and *Allegheny-Ludlum*, this Court held that the Commission had not exceeded its authority under the Esch Act in taking the

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[12] In *Oregon Pacific*, the Commission promulgated an emergency car service order, pursuant to Section 1(15) of the Interstate Commerce Act (now recodified as 49 U.S.C. § 11123), that limited the holding time of lumber cars at reconsignment points to five working days. Under the order, any shipper holding the car at such points for a longer period lost its reconsignment privilege and was required to pay the sum of the rates from origin to holding point, and from holding point to the destination. *Allegheny-Ludlum* involved two car service rules of the Commission that had the effect of requiring that, after unloading, freight cars be returned in the direction of the lines of the road owning the cars. The *Florida East Coast* case involved the establishment of incentive per diem rates by the Commission. The actions of the Commission at issue in *Allegheny-Ludlum* and *Florida East Coast* were taken pursuant to Section 1(14)(a) of the Interstate Commerce Act—now recodified as 49 U.S.C. § 11122. As described above, in the instant case, the Commission has disavowed its earlier reliance on Section 11122 in establishing the car hire "exemption."

actions at issue.[13] In *Florida East Coast Railway*, this Court held that in establishing incentive per diem rates, the Commission had complied with the requirements of the Esch Act that any action under the statute be taken only "after hearing," and that the Commission proceedings were not governed by Sections 556 and 557 of the Administrative Procedure Act (410 U.S. at 234-246).

Contrary to the Commission's suggestion, this Court did not hold in *Oregon Pacific*, *Allegheny-Ludlum*, or *Florida East Coast* that the Commission has *carte blanche* authority to take whatever actions it deems necessary to alleviate car supply problems. This Court merely held that the specific actions of the Commission at issue fell within the scope of its powers under the particular statutes on which the Commission relied. Implicit in these decisions was the long-established principle that an agency may not exceed its statutory authority. The Court of Appeals followed that principle in this case when it correctly found that the Commission's decision with respect to car service was not an "exemption" within the meaning of Section 10505.

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[13] The Solicitor General also asserts that the decision of the Court of Appeals conflicts with *Oregon Pacific*, because in the latter case this Court held that an order of the Commission requiring "local" freight rates, rather than the former demurrage charges, to be assessed, constituted a "suspension" of rules, regulations, or practices then established with respect to car service within the meaning of Section 1(15). Such reliance on *Oregon Pacific* is strained and misplaced. *Oregon Pacific* involved a decision of the Commission, in the exercise of its powers to regulate the national rail transportation system, to order "[t]he substitution of tariff rates already fixed and on file for the old demurrage rate" (420 U.S. at 191). This Court simply construed the term "suspension" in Section 1(15) as including the substitution of new regulation for the "old" regulation that had been suspended. That holding is plainly inapplicable here, where the language, purpose, and legislative history of Section 10505 demonstrate that the substitution of new regulation for old regulation is not an "exemption" within the meaning of the statute.

The Commission also asserts that the decision of the Court of Appeals "conflicts directly" with the holding of this Court in *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582 (1981). *See* Commission Petition at 17. This argument misconstrues the facts and the holding of *WNCN*. Contrary to the Commission's contention, this Court did not hold in *WNCN* that "the FCC can use its general powers as an administrative agency to deregulate a significant area" (Commission Petition at 17). *WNCN* involved a decision by the FCC that it would not consider past or anticipated changes in a station's entertainment format when it rules on an application for removal or transfer of a radio broadcasting license. Although the applicable provision of the Communications Act authorizes the FCC to grant applications for license transfers or renewals only if it determines that the "public interest, convenience, and necessity" will be served thereby, the FCC concluded that this provision did not require it to review format changes. The FCC's decision did not constitute "deregulation," but was a reaffirmation of long-established policy (450 U.S. at 598-599).

In *WNCN*, after reviewing the FCC's decision, the longstanding interpretation of the Act by the FCC, and the language and legislative history of the Communications Act, this Court concluded that the FCC's interpretation of the "public interest standard" was not inconsistent with the Act (*id.* at 593-604). The Court reasoned that the FCC has broad discretion in determining what the "public interest" requires, and that the FCC had fulfilled its statutory obligation of providing a rational explanation for its decision (*id.* at 593-596, 603).

WNCN held only that the FCC had not acted inconsistently with its particular statutory obligations in promoting diversity in entertaining programming through market forces. This Court noted the obligation of an agency to act in accordance with its statutory duties (*id.* at 603). Here, by contrast, the statute on which the Com-

mission purportedly relied clearly did not authorize the new car hire regulations.

Both the Solicitor General and Conrail argue that the decision of the Court of Appeals is also inconsistent with the recent decision of this Court in *ICC* v. *American Trucking Associations, Inc.*, 104 S. Ct. at 2458 (1984) (*"ATA"*). *See* Brief for United States, at 28-29; Conrail Petition at 22-23. In *ATA*, this Court held that the Commission had "discretionary authority" to reject an effective tariff that had been submitted in substantial violation of a rate bureau agreement, although the Interstate Commerce Act did not expressly provide for such authority, because tariff rejection "is closely and directly related to the Commission's express statutory powers and is designed to achieve objectives set forth for the Commission by Congress" (104 S. Ct. at 2460). The Court emphasized that its holding was narrow and was confined to the particular circumstances involved in that case (*id.* at 2460-2465).

ATA involved an attempt by the Commission, as part of its regulation of motor carrier rate tariffs, to exercise powers not expressly set forth in the Act in order to achieve the objectives of the Act. That situation does not exist here. Section 10505, the statute on which the Commission relied, expressly empowers the Commission to deregulate, provided that the Commission meets the requirements of that statute—including the requirement that the action taken constitute an "exemption" from regulation. Furthermore, as the Court of Appeals noted, Section 11122 specifically empowers the Commission to regulate the terms of car hire arrangements (including per diem rates, storage fees, and empty return charges) and sets forth the requirements that the Commission must meet in order to exercise that power (App. 67a-68a).[14]

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[14] The Solicitor General and Conrail also appear to rely on two other decisions of this Court in support of their argument that the Commission is empowered to grant a partial, as opposed to total,

In addition, the actions of the Commission here do not meet the two-part test of *ATA*. In order to lie within the Commission's discretionary power, the action must further a specific statutory mandate of the Commission, and must be "directly and closely tied to that mandate" (104 S. Ct. at 2466). Because the Commission's actions impose a new regulatory scheme over the car hire relationship, they plainly have no relationship to (and, indeed, frustrate) Section 10505's mandate of deregulation.[15]

Finally, Conrail professes to find a conflict between the decision of the Court of Appeals and "the decisions of this Court establishing the 'well-settled principles' that agencies have broad discretion to determine which of their

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exemption from regulation: *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 654-657 (1978); *United States* v. *Chesapeake & Ohio Ry.*, 426 U.S. 500, 509-515 (1976). However, the Solicitor General and Conrail misread the decision of the Court of Appeals. The court expressly stated that the Commission is empowered to adopt either partial or complete exemptions from regulation (App. 56a-57a). It simply held that the specific actions taken by the Commission did not constitute an "exemption" within the meaning of Section 10505. Moreover, *C&O* and *TAPS* are inapposite because, like *ATA*, they involved the issue of whether the Commission had the *implied* power to place conditions on its acceptance of proposed tariffs. Here, the Commission relied exclusively on the powers expressly set forth in Section 10505 as the source of its authority.

[15] Conrail alleges that the Court of Appeals "disregarded" 49 U.S.C. § 10321(a), which provides that enumeration of one power of the Commission in the Interstate Commerce Act does not exclude another power the Commission may have in carrying out the Act (Conrail Petition at 23). The Commission, however, did not purport to rely on this provision as a basis for its actions; it relied exclusively on Section 10505. In *ATA*, this Court cited Section 10321(a) only as the basis for rejecting the argument that the inadequacy of an agency's express authority is evidence that Congress did not intend for the agency to have more adequate powers (104 S. Ct. at 2467 n.11). *ATA* does not hold, nor does Section 10321(a) provide, that when the Commission relies exclusively on a particular statute as the source of its authority, it may take actions inconsistent with that statute.

authorities to invoke to achieve a desired result; that their actions are presumed valid; and that courts must defer to and accept an agency's reasonable interpretation of its own statutory authority if not contrary to the clearly expressed intention of Congress" (Conrail Petition at 23). The decision of the Court of Appeals, however, is fully consistent with each of these principles. As this Court stated in one of the cases cited by Conrail, "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear Congressional intent." *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council*, 104 S. Ct. 2778, 2782 n.9 (1984). The Court of Appeals performed that function here; it examined the language, history, and purpose of the particular statute on which the Commission relied and correctly determined that the specific actions taken by the Commission with respect to car hire and car service fell outside the scope of that statute.

III. THE DECISION OF THE COURT OF APPEALS LEAVES THE COMMISSION FREE TO TAKE ACTION UNDER OTHER STATUTES, OR TO DEREGULATE CAR HIRE ENTIRELY

The Solicitor General acknowledges that this Court should not review the car hire issue unless it also agrees to review the joint rate issue, because the decision of the Court of Appeals does not foreclose the Commission from promulgating the car hire regulations involved, or from achieving the professed objectives of these regulations, under certain provisions of the Interstate Commerce Act (Brief for United States, at 26 n.4.):

> "If the Court decides not to review the joint rate issue, we do not recommend considering the car hire issue independently. The decision below appears to leave room for adoption of this regulation on remand under other authority (Pet. App. 65a). Moreover, the car hire rules are under consideration in a wider context in Ex Parte No. 334 (Sub-No. 5),

> *Zone of Reasonableness for Car-Hire Charges*, 364 I.C.C. 299 (1980), and Ex Parte No. 346 (Sub-No. 19), *Boxcar Car Hire and Car Service—Advance Notice of Proposed Rulemaking*, 49 *Fed. Reg.* 27333 (July 3, 1984). While we are advised that neither of these proceedings is likely to render this case moot, they would offer the Commission alternative means for accomplishing its objectives in the event the petitions were denied." [16]

Under this reasoning, this Court should deny the request for review of the car hire issue *regardless* of its disposition of the joint rate issue. If the Commission remains free to adopt the regulations under other authority, the car hire issue certainly does not rise to the level of importance that warrants review by this Court.

The statement of the Solicitor General also demonstrates the lack of merit in the protests of the Commission that the decision of the Court of Appeals "forecloses" it from addressing the problems of car supply and freight utilization (*see* Commission Petition at 5-6). If the Commission wishes destination carriers to have greater leverage in their relationships with boxcar owners, the Commission appears to have the power to achieve this result under the "other authority" to which the Solicitor Gen-

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[16] The two proceedings to which the Solicitor General refers were instituted by the Commission even before the Court of Appeals issued its decision. In one proceeding, the Commission has given parties the opportunity to submit proposals as alternatives to the car hire and car service aspects of its *Boxcars I* decision. *See* Ex Parte No. 346 (Sub-No. 19), *Boxcar Car Hire and Car Service—Advance Notice of Proposed Rulemaking*, 49 *Fed. Reg.* 27333, 33026 (1984); Commission decision served September 28, 1984. In the second proceeding, the Commission is considering whether to grant carriers freedom to negotiate car hire increases above prescribed per diem rates. *See* App. 128a; Ex Parte No. 334 (Sub-No. 5), *Zone of Reasonableness for Car-Hire Charges*, 364 I.C.C. 299 (1980). As stated above, in 1980 the Commission authorized carriers to negotiate bilateral car hire reductions below prescribed per diem rates. Ex Parte No. 334 (Sub-No. 4), *Flexibility in Setting Railroads Per Diem Levels*, 364 I.C.C. 291 (1980).

eral referred—Sections 11122 and 10505 of the Interstate Commerce Act.

First, Section 11122(a) of the Interstate Commerce Act empowers the Commission to promulgate regulations that include "the terms of any arrangement for the use by a rail carrier of a . . . freight car . . . not owned by the rail carrier . . ." (Conrail Petition at 4-5). Both the Court of Appeals and the Commission—which originally relied on this provision in *Boxcars I*—have construed the language of Section 11122 as appearing to empower the Commission to issue car hire regulations like those that the Commission attempted to promulgate here under Section 10505, provided that the conditions set forth in the statute are met (App. 65a-67a, 136a).

Second, as the Court of Appeals noted, the Commission can totally deregulate car hire pursuant to Section 10505, provided that the predicate findings under that statute can be made (App. 69a). Thus, under Section 10505 the Commission may exempt all terms of car hire arrangements—including per diem, storage fees, and empty mileage charges—from regulation and leave determination of these issues to the railroads through bilateral agreements (*id.*). In *Boxcars I*, the Commission stated that it "did not reject the notion of complete deregulation of car hire" (App. 165a). The pending Commission proceedings noted by the Solicitor General afford the Commission the opportunity to effectuate such complete deregulation.

The Commission, therefore, has not been foreclosed or circumscribed in its attempts to rectify problems in the areas of car hire and car service. The Court of Appeals simply held that the Commission could not promulgate regulations entitling carriers to impose the new storage fees and empty return charges under Section 10505.

Conrail argues that its petition should be granted because the decision of the Court of Appeals is an "erro-

neous and severe" limitation of the Commission's exemption authority (Conrail Petition at 21-22):

> "Absent total deregulation of prices and services, any exemption can be said to reflect a policy choice to permit new forces to offset the regulatory 'entitlements' of those benefitted by the remaining regulation, yet that fact has not impaired any of the ICC's major exemptions approved by the courts to date. The court cited no indication of Congressional intent that partial exemptions that achieve only limited deregulation are beyond the scope or intent of section 10505." (Footnotes omitted.)

This argument is totally misplaced, because it assumes that the decision of the Court of Appeals precludes the Commission from granting partial exemptions. In its decision, however, the Court of Appeals squarely held that the Commission *may* grant a partial exemption (App. 56a-57a). Authorizing carriers to assess storage charges and empty return charges to "offset" per diem charges is not an exemption from regulation, but new regulation. By contrast, in the previous exemptions granted by the Commission and cited by Conrail, the Commission exempted carriers from statutory requirements without attempting to substitute a new regulatory framework.[17]

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[17] *American Trucking Ass'ns* v. *ICC*, 656 F.2d 1115 (5th Cir. 1981), involved a decision of the Commission to exempt transportation provided by rail carriers in connection with trailer-on-flatcar and container-on-flatcar service from the provisions of the Interstate Commerce Act, with the exception of accounting and reporting requirements. *See* 49 C.F.R. § 1039.13. *Simmons* v. *ICC*, 697 F.2d 326 (D.C. Cir. 1982), involved an ICC decision holding that states and their contract operators providing rail service on abandoned lines under state-organized rail programs would be exempt from: (1) the requirements of 49 U.S.C. §§ 10901 and 10903 that rail service be commenced or terminated only with prior Commission approval; (2) the common carrier obligations of 49 U.S.C. § 11101; (3) the labor protection provisions of 49 U.S.C. §§ 10903(b)(2) and 11347. *See also, e.g.*, 49 C.F.R. §§ 1039.11 and 1039.15 (exempting iron chloride liquid, iron sulphate, and export coal from all provisions of the Interstate Commerce Act except accounting and reporting requirements).

The decision of the Court of Appeals simply held that the Commission may not use Section 10505 as a source of authority for entitling carriers to assess storage fees and empty return charges. It leaves the Commission free to exercise its powers under Section 10505, as long as the action taken is an "exemption" from regulation. If that condition is a "limitation," it is a limitation imposed by Congress.

CONCLUSION

This case involves only an issue of statutory interpretation and presents no novel legal issues. The Court of Appeals properly applied the rules of statutory construction, and its conclusion that the actions of the Commission fell outside the scope of Section 10505 was clearly correct. The petitions for certiorari should therefore be denied.

Respectfully submitted,

RICHARD J. FLYNN, P.C.*
RICHARD E. YOUNG
TERENCE M. HYNES
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000
Attorneys for Canadian National Railway Company and Canadian Pacific Limited

* Counsel of Record

March 8, 1985